

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

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| CASE NUMBER: | 20/LTK/0013 |
| ORIGINAL CASE NUMBER: | 19/RAK/0003 |
| BETWEEN: | SHANAL |
| AND: | AMRITA |
| Appearances: | <i>No Appearance for the Appellant. Ms. S. Ali for the Respondent.</i> |
| Date/Place of Judgment: | <i>Tuesday 13 August 2024 at Suva.</i> |
| Judgment of: | <i>Hon. Madam Justice Anjala Wati</i> |
| Category: | <i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i> |
| Anonymized Case Citation: | SHANAL v AMRITA – Fiji Family High Court Case number: 20LTK0013 |

JUDGMENT

A. Catchwords:

FAMILY LAW – CHILD ABUSE – APPEAL – If parenting orders are in place, a subsequent child abuse application cannot be dealt with on an ex-parte basis and the parenting orders cancelled – the initial orders cannot be cancelled without hearing and determination on the issue of “best interest of the child” –on an interim basis, if the allegation relates to child abuse, which, prima facie, is serious and has the effect of impacting the child’s mental and physical health, the parenting orders can only be suspended or varied until the hearing and determination of the allegation – even on an interim basis , the court ought to balance the competing rights of the children which is to have regular and meaningful contact with the parent they do not live with and to be mentally and physically safe with them - the Social Welfare Department ought to be involved for reports on matters the court considers fit in the interest of the child - a finding proper needs to be made on Form 15 then only can final parenting orders be cancelled.

B. Legislation:

- 1. Family Law Act 2003 ("FLA"): s.54.***
- 2. Family Law Rules 2005 ("FLA"): Rule 8.20.***

Cause and Background

1. The appeal before me is by the father against the orders of the Resident Magistrate cancelling all orders for contact made in favour of him and the paternal grandmother.
2. The orders were cancelled ex-parte on the mother's allegation of indecent assault by the father. Through Form 15, which is a Notice of Child Abuse application, she alleged that the children's father had indecently assaulted the 2 son's.
3. The parties have 3 children of the marriage. They are all male children. The children are now aged 16, 13 and 11.
4. The mother had initially applied for parenting orders seeking residence of all children of the marriage. The court made the following final parenting orders:-

(1) Mother to have residence of the children.

(2) The father or the children's paternal grandmother to have contact with the children every weekend from Saturday 11 am to Sunday 5 pm.

(3) In the two weeks school holidays, the father or the children's paternal grandmother shall have contact of the children for the first week commencing Saturday 11 am and ending Sunday 5 pm (7 days).

(4) In the year end school break, the father or the paternal grandmother shall have contact for half of the school holidays in alternate weeks. The contact to resume from the first week of Saturday 11 am to Sunday 5 pm. The children to stay with their mother from Sunday 5 pm to Saturday 11 am the following week. The contact to alternate in that fashion on a weekly basis.

(5) The point of exchange was to be at the nominated police station.

5. A year after the final orders, the mother filed the child abuse application. At that time, the father was having the children for the one week of the 2 weeks school holidays.
6. On the first day the application for child abuse was listed, the court cancelled the final orders for contact on an ex-parte basis and ordered that all the children be recovered from the father with the assistance of the police officers. The matter was adjourned to a later date.
7. Within 7 days, the father filed the appeal against the orders cancelling contact.

The Appeal

8. The father's appeal concerns the cancellation of all the orders for contact without any independent report from the Social Welfare Department and evidence on the allegation of child abuse.
9. The father also challenges the mother's locus standi in bringing the application. It is contended that she failed to establish that it was in the interest of the children to be dealt with by an ex-parte application and be recovered from the father's care at the time.

Law and Analysis

10. It was in the best interest of the children that the final parenting orders were made and regular contact was given to the father and the paternal grandmother. Once a court has established on the evidence that certain parenting orders are in the best interest of the children, those orders cannot be cancelled unless it is no longer in the interest of the children to continue with those orders.
11. In this case, the mother only made an allegation of abuse on the two male children. The law requires that when a notice of child abuse is filed, a copy be served on the Social Welfare Department: ***Rule 8.20 (1) (iii) of the FLR.***

12. The purpose of serving the notice on the Social Welfare Department is to put the Social Welfare Department on notice that a proceeding has been filed in court regarding particular children being abused.
13. When the matter is listed for first call, the Court should make an order for the Social Welfare Department to carry out a thorough investigation on the allegation and provide to it a report under section 54 of the FLA. The court should also direct that the application be served on the party alleged.
14. During the investigation, the Social Welfare's powers extends to interviewing the children, the relevant parties and witnesses regarding the allegation. The court must wait for the outcome of the investigation from the Social Welfare Department. The investigation report of the Social Welfare Department should form part of the evidence in the hearing of the application for child abuse.
15. In the interim, if the allegation is serious and the court is of the view that it has potential to cause the children mental or physical harm, the court may, on an ex-parte basis, only suspend the contact for a very short time and not cancel the orders.
16. After the suspension of the contact orders, the alleged perpetrator must be served with the application to hear his position. Simultaneously, the children ought to be urgently interviewed by the Family Court Counsellors. An interim report on their wishes regarding continued contact needs to be obtained. The Family Court has in-house counselors who are ready and prepared to cater for such emergency situations.
17. When the court has quickly assessed the father's position and is able to see the report on the wishes of the children, it can then, on an interim basis, decide whether the order will continue to be suspended or varied in the interest of the children.
18. In this case, the cancellation of the orders were draconian as it reflects that the court had made a finding without hearing the parties. This is most prejudicial to the person who has been alleged to have abused the child (ren).

19. It ought not to be overlooked that the court had to balance the competing rights of the children. The competing rights are to have regular and meaningful contact with the parent they do not live with and at the same time to be mentally and physically safe with that parent. The court did not balance that right when it outrightly cancelled the orders for contact.
20. If the court had the benefit of knowing the father's position and the children's views, it would have been in a fair position to assess whether the contact needed to be varied to "*supervised contact*" until the allegations were heard and determined.
21. If the children did not wish to have continued contact and the assessment of the counsellor was that it would be mentally traumatizing for the children, the orders could only be suspended until the hearing and determination of the allegation.
22. In this case the court did not even involve the Social Welfare Department. It did not have the application served on the father. It did not even inform itself of the children's wishes on continued contact with the father and the grandmother. It just cancelled the contact orders.
23. I understand that it may not be possible to hear the father fully on the first day the matter is listed but to cancel the orders completely without considering a suspension of it or variation of it until the hearing of the child abuse application was not in the best interest of the children.
24. I would have accepted it proper if the order was only suspended and the parties heard on the issue. The procedure adopted by the mother opens room for disgruntled parents to raise issues of abuse in a flimsy way and get contact orders cancelled.
25. It must not be overlooked that the paternal grandmother in this case had also been getting contact of the children. There were no allegations against her. Why were the orders cancelled against her?

26. The court below could have done some changes to the contact orders instead of cancelling it altogether. Some thinking was required in the interest of the children which the court failed to carry out.

27. During the pendency of the appeal, I had granted orders for the children to have contact with the father and grandmother on every Fridays from 4.30pm to Sundays 5pm. I had ordered the father and grandmother to pick the children together from the mother's place. In this way the grandmother was always going to be with the children and see that they are safe. Honourable Justice Jude Nanayakkara had varied the exchange point to a nominated Police Station. The rest of my orders had remained.

Final Orders

28. In the final analysis, I make the following orders:

- a. *The appeal is allowed. If the Form 15 application is not yet heard, it must be done so immediately.*
- b. *My orders for contact to the father and the paternal grandmother on all Fridays from 4.30pm to Sundays 5pm remains, unless different orders have been issued post the hearing of the child abuse application.*
- c. *If the child abuse application has not been heard, then my orders are until the final determination of the application and orders thereon. Until then, both the father and the paternal grandmother are to pick the children from the nominated Police Station. The paternal grandmother is to supervise the children at all times.*

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Hon. Madam Justice Anjala Wati

13.08.2024

To:

1. *Niudamu Lawyers for the Appellant.*
2. *Legal Aid Commission for the Respondent*
3. *File: Family Appeal Case Number: 13 of 2020.*